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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY CALVIN NUTT,

Defendant and Appellant.

F057977

(Super. Ct. No. 1246587)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna F. Reeves, Judge.

Alison E. Kaylor, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Kane, J., and Poochigian, J.

STATEMENT OF THE CASE

On March 30, 2009, appellant, Jeffrey Calvin Nutt, was charged in an amended information with attempted robbery (Pen. Code, §§ 664, 211, subd. (a), count one),¹ and commercial burglary (§ 459, subd. (a), count two). It was alleged in count one that appellant personally used a firearm (§ 12022.53, subd. (b)), and was personally armed with a firearm (§ 12022, subd. (a)(1)). Count two alleged appellant personally used a firearm (§ 12022.5, subd. (a)), and was personally armed with a firearm (§ 12022, subd. (a)(1)).

At the conclusion of a jury trial on April 2, 2009, appellant was convicted of both counts and the jury found the enhancements true. On June 5, 2009, the trial court sentenced appellant to prison for the midterm of two years on count one, plus an additional ten years for the section 12022.53, subdivision (b), enhancement.² Appellant's sentence on count two was stayed pursuant to section 654. Appellant's total prison term was 12 years. Appellant filed a timely notice of appeal.

FACTS

On June 19, 2008, just before closing time between 9:50 p.m. and 10:00 p.m., appellant entered a Walgreen's wearing a black scarf with holes cut out for his eyes. Employee Stephanie Cruz was in the store off to the side of the front register. Cruz described the scarf as a winter scarf with a thicker weave. Appellant was wearing a black winter coat made of a polyester-type material and buttons. The coat had had a collar. Appellant was wearing black jean shorts that went past his knees.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

² An attempted robbery is defined as a serious felony pursuant to section 1192.7, subdivisions (c)(19) and (c)(39). Furthermore, any violation of section 12022.53 is defined as a serious felony under section 1192.7, subdivision (40). Appellant would not, therefore, qualify for extra custody credits under section 4019, as amended, effective January 25, 2010.

Appellant was wearing a beanie that was not completely pulled forward. Cruz could tell he was wearing loose, older corn rows that were not tightly fitted. Cruz thought appellant looked young from the facial area around appellant's eyes that was visible through the holes in the scarf. Appellant was shorter than Cruz who is five feet three and a half inches tall. Cruz identified photographs of appellant and identified him in court.

Appellant went over to the front register and started to beat the ATM, damaging it. Appellant jumped over the counter, stumbling as he did so. Appellant composed himself and made eye contact with Cruz. Appellant lifted his gun and demanded Cruz to come to him. Appellant repeated his command and was loud. Cruz described appellant's gun as long with a "thinner" caliber. Cruz later described the gun as being located in the sleeve of appellant's coat and it appeared to be a longer-type shotgun. The gun had no handle so appellant could hold it closer to the trigger.

Cruz lifted her hands and told appellant to take what he needed and to get out. Cruz did not go over to appellant. She had a young child at home and was pregnant. Cruz was afraid she was going to get shot. Appellant started to approach her. Cruz still had her hands up and kept pleading with appellant to take what he needed and to get the hell out of there. Appellant kept demanding that Cruz come over to him and she began backing away from him and telling him no. As Cruz backed away, she tripped over a dolly hand truck and fell. Cruz jumped to her feet, got around a display table, ran down an aisle back to the store manager, and told him someone tried to rob the store.

Ceres Police Officer Brian Petersen responded to the scene. Two suspects, including appellant, had been apprehended nearby. Petersen walked between the place the suspects were apprehended and the store and found a shotgun under some brush. The gun was not loaded with ammunition and was not covered in rust or dirt. Cruz and another store employee identified the shotgun as the one they saw appellant holding. The gun was operable. No usable finger prints were found on the gun.

Police Officer Travis Hudson advised appellant of his *Miranda* rights.³ Appellant told Hudson he understood his rights and agreed to talk. Hudson told appellant that he met the description of the person who attempted to rob the pharmacy. Appellant initially denied being involved. Hudson explained that several witnesses had positively identified him and they would review the surveillance footage.⁴

When Hudson asked appellant why he would want to rob the pharmacy, appellant explained he wanted to help the family of his friend Corey, who had recently passed away, with Corey's burial costs. Appellant said he used a small plastic pistol to commit the robbery and broke it into pieces and threw it away as he fled. Appellant told Hudson he went into the pharmacy with the gun, tripped over the counter, saw fear in the clerk's eyes, and heard Corey speaking to him. Appellant decided the robbery was a bad idea and fled. When Hudson showed appellant the shotgun that was recovered, appellant admitted it was the gun he used during the attempted robbery.

Appellant's height was measured at five feet eight inches. Appellant was not wearing five inch platform shoes. Police Officer Lorenzo Beltran saw a young black male hanging around a Cadillac near the incident who sat around for a while before driving away.

APPELLATE COURT REVIEW

Appellant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel indicating that appellant was advised he could file his own brief with this court. By letter on November 3, 2009, we invited appellant to submit additional briefing. Appellant replied with a two page letter brief

³ *Miranda v. Arizona* (1966) 384 U.S. 436.

⁴ Hudson also found a knit cap with eye holes cut into it, a black handkerchief, a backpack, and a trench coat. !(RT 163)!

asserting that there were factual inconsistencies in the testimony of prosecution witnesses, he was not accurately identified by the victim, his admission to Officer Hudson was not enough to support his conviction, there was no camera where the incident occurred, and there were no finger prints on the gun retrieved by officers.

Appellant's challenges are, in effect, a challenge to the sufficiency of the evidence adduced at trial. In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. It is the jury, not the appellate court, which must be convinced of a defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320; and *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In reviewing a challenge to the sufficiency of the evidence, appellate courts do not determine the facts. We examine the record as a whole in the light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129; *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Appellant challenges what he believes are factual inconsistencies in his identification by eyewitnesses. For instance, Cruz described appellant as wearing all black clothes and being about five feet three inches tall when he was measured at five feet eight inches tall. Appellant argues he was wearing blue jeans. These are also a dark

color. Cruz testified that she was pregnant and afraid that appellant would shoot her with a shotgun. She could easily misperceive appellant's height and still be able to accurately identify him. It was for the jury to evaluate the quality of Cruz's identification of appellant.

The absence of a camera on the scene does not undermine the identifications of appellant by the eyewitnesses. Appellant and his accomplice were caught fleeing from the scene shortly after the crime. Every witness's recollection was fresh. The absence of a fingerprint on the shotgun also is not conclusive. Cruz identified the shotgun and one of the officers testified it is common not to find fingerprints on weapons.

Finally, there was substantial evidence that appellant committed the crime aside from his confession to Officer Hudson. There was no violation of the corpus delecti rule.⁵

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues.

DISPOSITION

The judgment is affirmed.

⁵ The prosecution must prove the corpus delecti, or the body of the crime itself – i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. The prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1168.) The rule requires *corroboration* of the defendant's extrajudicial utterances insofar as they indicate a crime was committed, and forces the People to supply as part of their *burden of proof* in every criminal prosecution, some evidence of the corpus delecti aside from, or in addition to, such statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1178.)

The modicum of necessary independent evidence of the corpus delecti, and thus the jury's duty to find such independent proof, is not great. The independent evidence may be circumstantial, and need only be a slight or prima facie showing permitting an inference of injury, loss, or harm from a criminal agency, after which the defendant's statements may be considered to strengthen the case on all issues. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1181.)